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NO. 83-200

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IN THE  
UNITED STATES SUPREME COURT  
OCTOBER TERM, 1982

W. J. ESTELLE, JR., DIRECTOR  
TEXAS DEPARTMENT OF CORRECTIONS,

Supreme Court of the  
U. S. A.

OCT 31 1983

ALBANY, N. Y.

Petitioner,

v.

WESLEY JOE TARPLEY,

Respondent.

ON PETITION FOR A WRIT OF HABEAS CORPUS  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNSEL FOR RESPONDENT

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QUESTION PRESENTED

When the jury instructions in a state criminal trial erroneously include a definition of a crime not alleged in the indictment and, when viewed as a whole, the instructions are so confusing that a reasonable juror could conclude that the accused could be convicted for the unalleged offense, especially where the circumstantial evidence for conviction under the alleged offense is weaker than the evidence for conviction under the unalleged offense, is the granting of federal habeas relief justified?



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W. J. ESTELLE, JR., DIRECTOR  
TEXAS DEPARTMENT OF CORRECTIONS,

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V.

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Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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RESPONDENT'S BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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RESPONDENT'S BRIEF IN OPPOSITION

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Respondent Wesley Tarpley respectfully requests that this Court deny the Petition for writ of certiorari seeking review of the United States Court of Appeals for the Fifth



Circuit's opinion in this case entered on April 18, 1983, with a rehearing en banc denied on July 6, 1983.

#### OPINIONS BELOW

The opinion of the Court of Appeals is reported at 703 F.2d 157, reh. denied, \_\_\_\_\_ F.2d \_\_\_\_\_ (5th Cir., July 6, 1983). (Petitioner's Appendices A and B.) The report and recommendation of the United States Magistrate, adopted by the district court, appears as Petitioner's Appendix C.

#### JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 18, 1983. A timely filed petition for rehearing en banc was denied on July 6, 1983. The petition for writ of certiorari was filed within sixty days after final judgment in this case. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

No person shall be . . . deprived of life, liberty, or property, without due process of law  
. . . .



The Fourteenth Amendment provides, in pertinent part,  
as follows:

No State shall . . . deprive any person of life,  
liberty, or property, without due process of law  
. . . .

The Texas Credit Card Abuse Statute, TEX. PENAL CODE ANN.  
§ 32.31 (VERNON 1974), provides, in pertinent parts:

- (b) a person commits an offense if:
  - (1) with intent to obtain property or services fraudently, he presents or uses a credit card with knowledge that:
    - (A) the card, whether or not expired, has not been issued to him or is not used with the effective consent of the cardholder . . . .
  - (3) he receives property or services that he knows has been obtained in violation of this section . . . .

#### STATEMENT OF THE CASE

##### A. Course of Proceedings and Disposition Below

On January 27, 1976, Wesley Joe Tarpley was indicted for the offense of credit card abuse. Mr. Tarpley pleaded not guilty and was tried by a jury in the 104th District Court of Taylor County, Texas. On May 3, 1976, the jury found Mr. Tarpley guilty of the offense of credit card abuse and assessed his punishment at imprisonment for eight years. Mr. Tarpley's conviction was affirmed by the Texas Court of



Criminal Appeals on May 10, 1978. Tarpley v. State, 565 S.W.2d 525 (Tex. Crim. App. 1978).

Mr. Tarpley filed five state applications for writ of habeas corpus challenging this conviction. Those writs were denied by the Court of Criminal Appeals on September 20, 1978; April 4, 1979; November 7, 1979; March 19, 1980, and December 3, 1980. Ex parte Tarpley, Application No. 3609. Mr. Tarpley also filed an application for writ of habeas corpus to the Federal Court for the Northern District of Texas at Abilene, Texas, but that case was dismissed without prejudice so that Mr. Tarpley could exhaust his state remedies. Tarpley v. Estelle, No. CA1-81-37.

After exhausting his state remedies, Mr. Tarpley filed an application for writ of habeas corpus in the United States District Court for the Northern District of Texas, Abilene Division. The magistrate filed his report and recommendation in this case on June 16, 1981. On July 7, 1981, the United States District Judge denied the application for writ of habeas corpus. The United States District Judge, on August 6, 1981, denied the certificate of probable cause. Mr. Tarpley timely filed for his appeal to the United States Court of Appeals for the Fifth Circuit on July 27, 1981.

On March 28, 1982, a panel of the United States Court of Appeals for the Fifth Circuit reversed the judgment of the



trial court. The court held that the writ should have been granted on the basis of erroneous jury instructions which it found might have allowed the jury to convict for an offense other than that alleged in the indictment.

B. Statement of Facts

Wesley Joe Tarpley was arrested, without a warrant, on January 28, 1976, inside the Sun Valley Motor Lodge room No. 9 in Abilene, Texas. He was then taken to the Abilene City Jail, and charged with credit card abuse. The following day, January 29, 1976, he was transferred to the Taylor County Jail. On February 7, 1976, the Grand Jury of Taylor County returned an indictment against Mr. Tarpley alleging that on or about January 27, 1976, he did:

Knowingly and intentionally with intent to fraudulently obtain services, to-wit: lodging, belonging to Emmett Martin present and use a BankAmericard credit card, belonging to J. M. Gassiot, hereinafter called card holder, with knowledge that such credit card had not been issued to him, the said Wesley Tarpley and was not used with the effective consent of the card holder . . .

(Tr. 3-4) (emphasis supplied).<sup>1</sup>

Mr. Tarpley was brought to trial on May 3, 1976, and his conviction for credit card abuse was based on circum-

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1. "Tr." refers to the transcript of Respondent's state trial; "SF" refers to the statement of facts.



stantial evidence. That evidence showed that on January 27, at 7:30 in the evening, a tall man with dark curly hair rented a room at the Sun Valley Motor Lodge in Abilene, Texas, using a credit card in the name of J. M. Gassiot. (SF 138.) That man filled out a lodge registration form and recorded an auto license plate number on the form. (SF 139.)

The two co-owners of the lodge, 74-year old Mrs. Emmett Martin and her 77-year old husband, testified that Mr. Tarpley was not the man who rented the room. (SF 140, 144, 153-155). Neither could not positively identify Mr. Tarpley as a companion to that man. In fact, Mr. Martin testified that the companion may have come into the lodge office, but that because the motel had quite a few guests, it could have been someone else. (SF 147, 153.) He also stated that he saw the second man "at a distance" but that he had a fairly good view of the two people and that, although Mr. Tarpley could have been the second man that accompanied the man that rented the room, he was not positive. (SF 147, 148, 153.)

The following morning, Mr. Martin checked the license plate on the automobile parked in the motel carport for room no. 9 and determined that the numbers on the license plate did not match the numbers that had been recorded on the motel registration the previous night. (SF 149.) Upon finding this



discrepancy, Mr. Martin called the BankAmericard headquarters.  
(SF 150.)

Mr. Jack Dieken, a detective with the Abilene Police Department, testified that after he spoke with Mr. Joe Bello of BankAmericard and with the Fort Worth Police Department, (SF 158.) he went to Sun Valley Motor Lodge, knocked on the door of room no. 9, entered the room, and arrested the two occupants, Wesley Joe Tarpley and John Hudson, for credit card violation. (SF 158, 159-161.) At the time of the arrest, Mr. Tarpley was dressed in a pair of undershorts and an undershirt and had just emerged from the bathroom. (SF 160, 279.) John Hudson, the man who rented the room on the previous night, was described by Mr. Dieken as being over six feet tall with curly black hair and a black moustache. (SF 160.)

In the room, in a suitcase belonging to John Hudson, the arresting officers found in a leather credit card holder the BankAmericard in the name of J. M. Gassiot that was used to rent room no. 9. They also discovered in Hudson's suitcase numerous credit cards issued to Gassiot and James L. Adams, credit card receipts, as well as checks for Imported Services Auto Parts of Fort Worth, Texas. (SF 161-166, 169.)

The luggage, including a locked box and the clothes from room no. 9 were taken to the police station where an inventory was made. (SF 225.) Mr. Dieken stated that there were a lot



of clothes hanging in the room at the time of the arrest and that he did not know who belonged to what as far as these clothes were concerned. (SF 279.) He further testified that both the key to the lodge room and the one that opened the locked box was contained from Mr. Tarpley's personal effects in his property at the city jail. (SF 226, 276, 278.) No evidence, however, was introduced to identify the "personal effects" referenced.

The locked box contained several items including: a BankAmericard bearing the signature of James L. Adams, Overseas Import Auto Parts; blank checks drawn on the Ridglea Bank in Fort Worth, Imported Auto Center and Ridglea Bank in Fort Worth, Overseas Import Auto Parts; a number of credit cards bearing the name Overseas Imported Auto Parts Corporation; and a Selective Service card bearing the name James M. Gassiot. (SF 226-231.) These items were offered and accepted as state's evidence over Petitioner's objection.

(SF 231-233.) Mr. Dieken also testified that there were "personal papers" bearing the name of Wesley Joe Tarpley in the locked box. (SF 281.) However, he never identified the "personal papers." The "personal papers" were not introduced into evidence; in fact, no items from the locked box bearing the name of Wesley Joe Tarpley were specifically identified or introduced into evidence.



Mr. Jimmy Gassiot testified that the credit card used to rent the motel room was his and that he gave no one permission to use it. (SF 284.) He further testified that his credit card was taken in December, 1975, along with several other credit cards and a checkbook during a burglary of his place of business, Imported Auto Center. (SF 283-285.)

At the conclusion of the trial, the court read the charge to the jury. (SF 290.) That charge stated in part:

A person commits the offense of credit card abuse if he receives services that he knows has [sic] been obtained by a person who, with intent to obtain service fraudulently, used a credit card with knowledge that it had not been issued to said person . . . Therefore, if you believe from the evidence beyond a reasonable doubt that the Defendant, Wesley Tarpley, did, in Taylor County, Texas, on or about January 27, 1976, receive services, to-wit: lodging with intent to obtain the service fraudulently, had used a credit card, to-wit: BankAmericard Credit Card No. 4656-100-053-011 belonging to J. M. Gassiot, with knowledge that such credit card had not been issued to him, the said Wesley Tarpley, and was not used with the effective consent of the said J. M. Gassiot, you will find the Defendant guilty.

If you do not so believe, or if you have a reasonable doubt thereof, you will find the Defendant not guilty.

(Tr. 28; emphasis supplied; see Petitioner's Appendix E.) The court then instructed the jury on the law of the parties and also gave an instruction on the law of circumstantial evidence (Tr. 28). The court did not read the indictment to the jury



as part of its instructions. The jury returned a verdict of guilty. (Tr. 32.)

#### SUMMARY OF ARGUMENT

The Court of Appeals correctly ruled that a reasonable juror could have understood the court's instructions to authorize conviction of an offense for which Respondent Wesley Joe Tarpley was not indicted. Mr. Tarpley was charged in a one-count indictment with the offense of credit card abuse under Section 32.31(b)(1)(A) of the Texas Penal Code, the presenting and using provision. In its instructions to the jury, the court did not define the offense of credit card abuse under that subsection. Instead, the court defined the law of credit card abuse under an entirely different subsection of the credit card abuse statute; that subsection deals with receiving services. It is apparent that the court's charge, when viewed as a whole, was so confusing that a reasonable juror could have convicted Mr. Tarpley for the uncharged offense.

#### REASONS FOR DENYING THE WRIT

##### I.

#### THE FIFTH CIRCUIT CORRECTLY APPLIED THE DECISIONS OF THIS COURT

The Fifth Circuit held that Respondent Wesley Joe Tarpley's constitutional right to due process of law was



violated by the lower court's jury charge that allowed the jury to convict Mr. Tarpley of a crime for which he was not indicted. The Fifth Circuit did not disregard or extend any decisions of this Court; it merely applied the rules announced by this Court to the unique facts of this case.

Due process in a criminal case requires, among other things, that an accused be convicted only for an offense for which he was charged. Garner v. Louisiana, 368 U.S. 157, 164 (1961). The requirement that an accused be informed of the specific charge against him and be allowed a meaningful opportunity to defend himself against the issues raised by that charge has been reiterated in numerous decisions of this Court. See, e.g. Cole v. Arkansas, 333 U.S. 196 (1948) and Jackson v. Virginia, 443 U.S. 307 (1979).

To determine whether these principles were met in a particular case, it is necessary to examine the indictment charging the accused with an offense and the court's instructions to the jury. Although the instructions must be viewed in the context of the entire charge, if a faulty instruction by itself so infects the entire trial so that the conviction violates due process, habeas relief may be granted. Cupp v. Naughten, 414 U.S. 141, 146-147 (1973). In reviewing the instructions, it also is important to focus on the words



actually spoken to the jury, "for whether a defendant has been accorded his constitutional rights depends upon the way a reasonable juror could have interpreted the instruction[s]." Sandstrom v. Montana, 442 U.S. 510, 514 (1979).

Contrary to Petitioner's assertion, the Fifth Circuit's ruling comes straight from Cole, Cupp and Sandstrom. Read together, these decisions merely require that jury instructions be sufficiently precise so that a reasonable juror understands that the accused can be convicted only for the crime for which he was indicted and for no other offense, except of course, a necessarily included offense. As discussed below, in this case, the court's instructions to the jury were so convoluted and ambiguous that a reasonable juror could have concluded that Mr. Tarpley could be convicted for an offense completely different and separate from the one specified in his indictment.

## II.

### THE JURY INSTRUCTIONS AUTHORIZED A CONVICTION FOR AN OFFENSE OTHER THAN THAT INCLUDED IN THE INDICTMENT AND THEREFORE DENIED RESPONDENT PROCESS OF LAW.

Mr. Tarpley was indicted for the offense of credit card abuse under the Texas Credit Card Abuse Statute. Tex. Penal



Code Ann. §32.31 (Vernon 1974). That statute identifies at least eleven distinct ways in which the offense of credit card abuse may be committed. It provides, in relevant parts, that:

(b) a person commits an offense if:

(1) with intent to obtain property or services fraudulently, he presents or uses a credit card with knowledge that:

(A) the card, whether or not expired, has not been issued to him and is not used with the effective consent of the cardholder: . . .

(3) he receives property or services that he knows has been obtained in violation of this section: . . . .

(emphasis supplied.)

The one count indictment charging Mr. Tarpley under the Texas Credit Card Abuse Statute alleges the conduct of the offense of credit card abuse as defined in Section 32.31(b)(1)(A), the "presenting and using" subsection, and no other. Although this was the only offense for which Mr. Tarpley was indicted, it is clear that the court's charge to the jury authorized conviction under Section 32.31(b)(3), the "receiving services" subsection, an offense not described in the indictment.

That a reasonable juror could have concluded that Mr. Tarpley could be convicted under 32.31(b)(3) is apparent. In its charge to the jury, the court defined the offense of



credit card abuse only as set forth in subsection b(3). See Petition for Writ of Certiorari, Appendix D. No other definition of the law was given. The Court then attempted to apply the law to the evidence of the case by partially tracking the language of section 32.31(b)(1)(A); however, this application was ambiguous inasmuch as it was preceded by the following instructions: "Therefore, if you believe from the evidence beyond a reasonable doubt that Defendant Wesley Joe Tarpley did, in Taylor County, Texas, on or about January 27, 1976, receive services . . . (emphasis added)." Id.

Petitioner suggests that the court somehow corrected its error by making reference to the indictment later in the jury charge. But the indictment was not read to the jury as part of its instructions. The indictment was read at the beginning of the trial. It is not only possible, but probable, that the reasonable juror would not recall the charge specified in the indictment. In fact, it is likely that the reasonable juror would rely solely upon a court's instructions at the end of the trial for guidance as to the specific crime for which an accused may be convicted. In this case, the court did not properly provide such guidance. For at the conclusion of Mr. Tarpley's trial, the court failed to define correctly the offense for which Mr. Tarpley was indicted, and instead defined the elements of a completely different crime. It is



clear, under these circumstances, that because the instructions to the jury were so confusing, the jury could have convicted Mr. Tarpley for the uncharged offense without completely misunderstanding the court's charge.

As noted by Petitioner, "because the evidence clearly showed that Respondent was guilty of having used a stolen credit card to fraudulently obtain services, it necessarily follows that it was sufficient to sustain a conviction for having received stolen services", it is even more likely that the jury interpreted the court's instructions as allowing Mr. Tarpley to be convicted for the crime of credit card abuse as defined in Section 32.31(b)(3). Id. at 9. This is especially true because the circumstantial evidence against Mr. Tarpley was, in fact, more persuasive for conviction of the unindicted offense.

In its Petition for Writ of Certiorari, Petitioner repeatedly notes that Mr. Tarpley did not testify or offer any evidence. Id. at 4, 6, 8 and 9. Although Mr. Tarpley does not deny this accusation, it is irrelevant to whether he was denied due process of law. Moreover, there is no question but that in a criminal proceeding, the burden of proof is upon the State and the accused not only does not have to but cannot be required to testify.



### III.

#### THE DECISION BELOW TURNED ON THE FACTS

The Court should not grant the writ in this case because it presents no unusual or special question of law. The Fifth Circuit rule is a correct application of existing rules to the facts at hand. A judge must charge the jury so that a reasonable juror will convict an accused only for the crime for which he was indicted. Ambiguous and erroneous jury instructions such as those offered in this case need not be condoned. Excoriation of such instructions blazes no new constitutional trails.

United States v. Irwin, 661 F.2d 1063 (5th Cir. 1981), cited by Petitioner, is factually distinguishable from this case in that one portion of the jury instructions in Irwin correctly defined the applicable law by separately listing the elements of the offense alleged in the indictment. Although a different portion of the instructions in Irwin also included the elements of other crimes, those elements were relevant to the main issue of the indicted offense. Moreover, in Irwin the court did not intrinsically combine these portions of the instructions so as to render the instruction "so confusing as to mislead" the jury that the accused could be convicted for crimes not alleged in the indictment. 661 F.2d at 1070. Obviously, Judge Rubin, writing for the court in both Irwin



and in Mr. Tarpley's case, recognized these factual distinctions and found them significant.

Petitioner cites no case in any other circuit that conflicts with the Fifth Circuit's decision. Petitioner does allege that the cases cited by the Fifth Circuit -- Gray v. Raines, 662 F.2d 569 (9th Cir. 1981); Goodloe v. Parratt, 605 F.2d 1041 (8th Cir. 1979); and Watson v. Jago, 558 F.2d 330 (6th Cir. 1977), are simply inapposite. While those cases do not involve scenarios identical to those in Mr. Tarpley's trial, they are analogous. Moreover, the holding in each of these cases supports the Fifth Circuit's ruling that an accused can only be convicted for the crime for which he was charged. Because the facts of this case so clearly call for the result reached by the Fifth Circuit, this Court should decline to issue a Writ of Certiorari.



CONCLUSION

For these reasons, Respondent Wesley Joe Tarpley prays that this Court deny the petition for certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

\_\_\_\_\_  
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\_\_\_\_\_  
MOTION FOR LEAVE TO PROCEED  
IN FORMA PAUPERIS  
\_\_\_\_\_

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Respondent, Wesley Joe Tarpley, asks leave to file the attached Brief in Opposition to Petitioner W. J. Estelle, Jr.'s Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to proceed in forma pauperis pursuant to Rule 46.1.

Respondent sought leave to proceed in forma pauperis in the proceedings below before the United States Court of



Appeal for the Fifth Circuit, which leave was granted. The Fifth Circuit subsequently appointed Molly Cagle and Mary Cecilia Kelly as Mr. Tarpley's counsel of record under the Criminal Justice Act of 1964, as amended.

Respectfully submitted,

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